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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 168.

HARVEY N. MIGHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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SUBJECT INDEX

Jurisdiction 2
Questions Presented 2
Facts 3
Argument 5
Conclusion 18

Appendix A—

Opinion of the Court of Appeals A1

Table of Cases

Bryan v. *United States*, (1949, C. A. 5th) 175 F. 2d 223, affd. 338 U. S. 552, 94 L. Ed. 335, 70 S. Ct. 317, reh. den. 338 U. S. 957, 94 L. Ed. 590, 70 S. Ct. 491 17

Capone v. *United States*, 51 F. 2d 609, 76 A. L. R. 1534 (1931, C. A. 7th Ill.) 13

Friedberg v. *U. S.*, 75 S. Ct. 138, 348 U. S. 142, 99 L. Ed. 188 ..... 5, 17

Guzik v. *United States*, 54 F. 2d 618 (1931, C. A. 7th Ill.) 13

Holland v. *United States*, 75 S. Ct. 127, 348 U. S. 121, 99 L. Ed. 150 ..... 5, 8, 17

Smith v. *U. S.*, 75 S. Ct. 194, 384 U. S. 147, 99 L. Ed. 192 ..... 5, 17

U. S. v. *Calderon*, 75 S. Ct. 186, 384 U. S. 160, 99 L. Ed. 202 ..... 5, 16, 17

United States v. *Fenwick*, (1941, C. A. 7th) 177 F. 2d 488 17

United States v. *Johnson*, 319 U. S. 503, 87 L. Ed. 1546, 63 S. Ct. 1233 13

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

The District Court did not write an opinion. The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, p. A1 is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on the 17th day of May, 1956. Its decision as to the applicability of the net worth theory in the prosecution of the petitioner, by holding that the government satisfied its burden of proof to establish with substantial accuracy the opening net worth of petitioner for the prosecution period, is a decision of a Federal question in a way probably in conflict with applicable decisions of this court. This court has jurisdiction to review the judgment rendered below by reason of the provisions of Section 1245 of Title 28, and Section 3772 of Title 18, of the United States Code.

QUESTIONS PRESENTED.

The questions presented for review are as follows:

In the prosecution of a taxpayer, by use of the net worth theory, for alleged income tax violations, may the government make a submissible case by establishing an opening net worth which: (1) Includes a portion of the assets disclosed by the taxpayer, but which does not include any amount for taxpayer's inventory of goods in his principal business when the nature of such business indicates the probable existence of a substantial inventory; and, (2) Arbitrarily assigns to taxpayer's opening net worth cash on hand in the amount of $10,000.00 when the taxpayer's statements and corroborating evidence, including evidence concerning the nature of the taxpayer's principal business, disclosed probable cash on hand in an amount in excess of $50,000.00?

May the government base its prosecution of the taxpayer on a net worth computation for the year 1947 when prior to such prosecution it has made no inquiries or asked for leads from the taxpayer respecting his cash or inventory on hand at the beginning of that year but has confined its inquiries to the year 1948 and subsequent years?

May the government pursue only those leads furnished by the taxpayer which are favorable to the prosecution, and decline to follow and investigate other leads supplied by him which would disclose the existence of additional cash or assets not included by the government in its opening net worth computations?

Did the Court of Appeals err in affirming the District Court's rulings on petitioner's Motion for a Judgment of Acquittal at the close of the government's testimony, on his Motion for Acquittal at the close of all of the evidence, and his Motion for a New Trial and Judgment of Acquittal after the verdict?

FACTS.

The facts revealed by the record are as follows: Petitioner was 52 years old at the time of trial. He completed the 9th grade of Kemper Military School. His first marriage terminated by divorce in 1940. His present wife, Florence, had worked for his father in Iowa and had known petitioner for 20 years (R. 192). He farmed and worked as an auto mechanic until 1936. During the latter part of 1938, petitioner and his present wife lived together at Russell, Kansas. During this time he was hauling whiskey (R. 193). From 1938 to 1940 he was serving a sentence in Iowa and was paroled in 1940. The Iowa State Parole Officer presented reports from April, 1940 to May, 1941, showing petitioner to be working on his father's farm for $20.00 per month during this period.

That he received small amounts of cash from his mother during the reporting period (R. 30). Under the regulations of the parole board petitioner had to show regular employment at a minimum of $20.00 per month (R. 30). The records of the Cessna Aircraft Company at Wichita, Kansas, show that he had a job there from March 23rd to April 3rd, 1942, at $.60 an hour (R. 29-30). He was operating in the liquor business for himself on his own money at the time (R. 201-2). In 1941 he had a chattel mortgage on a Ford Coupe in the amount of $414.30. He borrowed $5,000.00 when he bought a home in May, 1944 (R. 44). In February, 1944, he purchased a farm in Iowa, paying $20,000.00 cash (R. 189) (R. Ex. 91, 267). On four or five occasions in 1943 he left large amounts of currency with the owner of a large storage garage in Omaha, Nebraska, of which the largest amount was in excess of $30,000.00 (R. 179). Petitioner would return for the money later (R. 181). He stored as many as four or five cars in the garage in 1943 (R. 179). Income tax returns of petitioner and his wife prior to 1944 declared only small incomes from which no surplus could have been accumulated. The government's tabulation of petitioner's assets from 1940 to 1946 inclusive shows a computation by it of a small net worth at the beginning of the period and a net worth of $123,318.01 as of December 31, 1946 (Ex. 91, R. 267). The exhibit credits petitioner with cash on hand as of that date, the beginning of the prosecution period, of $10,-100.00, and does not allow any amount for inventory of goods on hand in his principal business.

During the first prosecution year, 1947, petitioner was admittedly in the wholesale liquor business in Russell County, Kansas. He also owned and operated farms, a cafe, oil wells and was a partner in an oil drilling company and a night club known as Pine Board, in which he had

been a partner with Cecil McFrederick since 1944. The Pine Board closed November 8th or 9th, 1947, after a police raid (R. 72). He was arrested before January 1, 1948, and served a sentence beginning January 2, 1948 (R. 192). His wholesale liquor business was liquidated by January 1, 1948 (R. 191-2). The government accepted the partnership returns of Pine Board, Russell Drilling Company and other partnerships as being substantially correct. His returns on his farm income, oil income and other reported transactions were admittedly correct except for irregularities not involving fraud (R. 192-193). Petitioner was active in his oil drilling, farming and building operations during the years 1948, 1949 and 1950. During the prosecution period he acquired assets, reflected in net worth as computed by the government, in excess of his reported income. The government contends that the excess is accountable to unreported income received during the prosecution period. Petitioner contends that the additional assets were acquired from liquidation of liquor inventory and cash on hand, not included in his opening net worth.

ARGUMENT.

This case differs from most of the reported cases in which the taxpayer was shown to be without substantial assets at the beginning of the period. *Holland* v. *United States*, 75 S. Ct. 127, 348 U. S. 121, 99 L. Ed. 150; *Friedberg* v. *U. S.*, 75 S. Ct. 138, 348 U. S. 142, 99 L. Ed. 188; *Smith* v. *U. S.*, 75 S. Ct. 194, 384 U. S. 147, 99 L. Ed. 192; and *U. S.* v. *Calderon*, 75 S. Ct. 186, 384 U. S. 160, 99 L. Ed. 202. The government proved that petitioner was engaged in the wholesale liquor business from 1943 to 1947. That for such purpose he had acquired a quonset hut near Russell,

Kansas, where he stored his inventory (R. 93). That his increase in net worth, plus his probable expenditures, between 1940 and the beginning of the prosecution period was greatly in excess of his reported income during those years. Petitioner has shown that the apparent increase in net worth came from the investment of working capital, consisting of cash, which was necessary to operate his liquor business prior to 1947. In 1943 he had $115,000.00 in cash (R. 195). Between 1943 and 1947 petitioner's wife handled part of the cash used in transacting the business. When a driver was sent to pick up a load of liquor she would hand him a "bank roll" of from $5,000.00 to $15,000.00, depending upon the load (R. 197). Frequently, several drivers were furnished "bank rolls" at the same time. In the summer of 1943 she buried $50,000.00 in cash at the farm of petitioner's father in Iowa (R. 191). Petitioner's son testified as to helping his father count and place in jars $50,000.00 in cash about Christmas time, 1943. After 1944, the money was removed and buried under petitioner's home in Russell, Kansas. At that time petitioner's wife added $25,000.00 to the buried hoard. The money was dug up in 1947 and $50,000.00 was buried under an airplane hangar petitioner had constructed on his property near Russell, Kansas. That money was dug up in 1950 in a deteriorated condition. Some of it was salvaged and some was redeemed at banks in Russell, Kansas, and Omaha, Nebraska (R. 191). A witness, M. D. Shaw, testified to seeing the money scattered all over the floors of the living room and dining room of petitioner's home (R. 186). The government proved the existence of a buried hoard of cash. A government witness, Dawson, banker of Russell, Kansas, testified as to deteriorated money given him by petitioner's wife. He stated:

> "Mrs. Mighell brought this money to me as stated in the letter. She brought currency that was in tightly

bound rolls, part of it, and part of it had evidently, evidently an attempt had been made to separate rolls. The money was in such a condition at the time it was brought in that it was impossible to determine the amount there in order that credit might be given. It was so that the pieces of money could not be taken apart. It was soiled. The rolls were bound. I don't remember whether they had a band around them or twine around them, but after the band was loosened or the string taken off of them, there was no life there to the bills at all. They were just a solid, welded mass. They were wet, too, damp. They were wet clear through. They were in such a condition that to try to separate them they just came apart.

Thereafter I received $8,800.00 as a check from the Treasury Department which was deposited to her account." (R. 55).

A government witness, Pat Flaherty, who was in the liquor business with petitioner from 1943 to 1947, testified that petitioner operated a "pretty big" business. That a good sized liquor business would require a bank roll of $50,000.00 or more (R. 64).

Very little of the testimony relative to the existence of a large liquor inventory and cash on hand prior to the prosecution period was susceptible of proof at the time of the trial. However, the circumstantial evidence and the testimony is such as to disclose overwhelmingly that petitioner did have, and the nature of his business required that he have, a substantial cash working capital and a large inventory of merchandise. The government made no attempt in its computations or in presenting its evidence to estimate or make allowance for such assets. The government, in crediting petitioner with cash on hand of $10,100.00 as of December 31, 1946, acted arbitrarily and without reasonable grounds, and did not request information from him although it had examined him relative to his

assets as of December 31st for the years 1947, 1948, 1949 and 1950. The government has sources of information not available to the taxpayer, such as the Internal Revenue Department, from which it can ascertain with reasonable certainty the cash and inventory reasonably necessary to operate a business of the size and nature of that owned by petitioner. It was well aware of the nature of his business and the size of his operation. His 1945 tax return disclosed total receipts from his liquor business of $65,000.00 (Ex. 8, R. 257). His 1946 tax return disclosed gross receipts from sales of liquor of $147,866.00 (Ex. 9, R. 258). His tax return for 1947 disclosed gross sales of liquor merchandise of $187,881.00 (Ex. 1, R. 229). The government well knew that the illegal liquor business is conducted on a cash basis. That those engaged in the business must be prepared to suffer and do suffer large losses when merchandise and transports are hi-jacked, or seized and confiscated by law-enforcement agents. In view of such knowledge, and of knowledge readily available to it, the government was unjustified in failing to realistically compute petitioner's net worth at the beginning of the period and it was an error to permit the case to go to the jury upon the evidence.

The Court of Appeals for the Tenth Circuit failed to heed the admonition of this court in the *Holland case, supra,* wherein the court stated:

> "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." 348 U. S. 129.

The Court of Appeals, upon review of this case, failed to give adequate consideration to those specific questions raised herein. The court entirely failed to consider or

comment upon the fact that the government did not indicate to petitioner prior to the filing of the complaint that it was seeking information upon which to base a prosecution under the net worth theory for the year 1947. On the 9th and 10th days of December, 1952, government agents interrogated him at length and obtained his sworn testimony as to the following pertinent questions:

"Q. 15. During the years 1948 through 1951 what was your occupation?"

"Q. 19. Were you engaged in the transportation or sale of liquor during the years 1948, 1949 and 1950?"

"Q. 46. What information did you supply to Mr. McCoy for the preparation of your 1948, 1949, 1950 and 1951 tax returns?"

"Q. 52. For the years 1948, 1949, 1950 and 1951, what do you estimate the amount spent by you for your personal living expenses?"

"Q. 53. * * * During the morning hours of today and a good portion of the afternoon we have been discussing with you and Mr. McCoy a schedule we left with you on November 18, 1952, showing your known assets and liabilities as of December 31 for the years 1947, 1948, 1949, 1950 and 1951. * * * In other words, we have asked you to prepare a balance sheet showing your assets and liabilities and net worth as of December 31 for the years 1947, 1948, 1949, 1950 and 1951, and to sign same. * * *"

"Q. 56. With reference to the balance sheet which we have been discussing, the first item appearing thereon is cash, currency on hand. The amount appearing on the statement at December 31, 1947, is *$116.00*" (Emphasis supplied. Probably a typographical error; should be $116,000.00).

"Q. 61. The figures for the years 1948, 1949, 1950 are as follows: * * *"

"Q. 86. Now, with regard to the cash currency on hand as of the present moment, is it true that to the

best of your knowledge you had approximately $116,-000.00 in currency at January 1, 1948?"

"Q. 101. Have you given Mr. Holland and me for our inspection all records which you or your wife have mentioned showing your taxable business transactions for the years 1948, 1949, 1950 and 1951?"

"Q. 102. Have you made an honest effort to file true and correct income tax returns for the years 1948, 1949, 1950 and 1951?" (Ex. E, R. 291-305).

At no time during that interview or at any time prior to trial was petitioner requested to furnish any information in respect to his assets or net worth as of December 31, 1946, or January 1, 1947. He was shown no computation of his net worth as of the beginning of 1947, or of his increase in net worth during that year. At some time between the 10th day of December, 1952, and the 11th day of March, 1954 (the date complaint was filed), the government apparently decided it did not have a sufficiently strong case for the years 1948, 1949, 1950 and 1951, and determined to prosecute petitioner for the 1947-1950 period. It may be granted that prosecution lies for any year for which there is sufficient evidence of evasion and which is not barred by the running of the Statute of Limitations; however, where the information relied upon to convict is supplied largely by leads furnished by the taxpayer, he is entitled to be advised of the prosecution period at the time the information is gleaned from him in order that he may make a complete record and furnish leads as to his net worth at all of the times material thereto. At the trial, the trial court refused to pass upon petitioner's Motion for a Bill of Particulars which would have aided in the preparation of his defense (R. 7-19).

The Court of Appeals summarily disposed of petitioner's claim to an inventory of merchandise in these words:

"We are in effect asked to presume that there must have been on hand a large inventory in order to carry on illicit liquor operations of such magnitude, but such a presumption disregards the very nature of appellart's illegal business. His business was carried on in dry territory close to the border of a state where the purchase of liquor was lawful. It is not unreasonable to presume, especially in the absence of any evidence to the contrary, that rather than subject himself to search and seizure, appellant sent the trucks which he owned across the line by stealth, loaded them with liquor, and transported it to its destination, rather than keeping on hand in dry territory, where it was subject to confiscation, large quantities from which to make deliveries. In any event in the absence of any clear and convincing evidence that appellant had on hand a substantial liquor, the question was at best for the jury." (P. 8).

The opinion of the court casts upon petitioner the burden of proving by "clear and convincing evidence" the existence of his liquor inventory. It ignores the evidence that petitioner owned a quonset hut, one of the assets included by the government in its computation of his net worth, and which was used to store his liquor inventory. It ignores, also, the principle well established in the criminal law that the prosecution must prove its case beyond a reasonable doubt.

The opinion disposes of the proof of a buried hoard, adduced from the testimony of a government witness, in these words:

"Neither was the evidence conclusive that there was a bured hoard of $50,000.00 or, if there was, when it was buried. But even if we assume that such sum was buried prior to 1947, it still leaves unaccounted for a very substantial amount of unreported income, if the jury believed the government's evidence, as it apparently did." (P. 8).

It ignores the fact that if the hoard was buried prior to 1950 and recovered in that year all of the alleged unreported income, or increase in net worth, would be accounted for in respect to 1950 and the conviction as to that year would not be sustainable. In addition, it requires petitioner to disprove by "conclusive" evidence the erroneous computations made by the government.

The Court of Appeals, in commenting upon petitioner's claim of a large amount of cash on hand, recited certain self serving statements made by the petitioner to the Iowa Parole Board and to the Cessna Aircraft Company. It is obvious that the statements made for the special purposes to be served did not state the whole truth and were entitled to little or no weight in determining petitioner's principal business and income during the periods covered. Further, the court placed its reliance upon a very slender reed when it stated:

> "A 1941 investigation by the Alcohol Tax Unit of the Internal Revenue Department in Iowa found no assets of the defendant. On November 14, 1941, he placed a $414.30 chattel mortgage on a 1941 automobile which he had or purchased." (P. 5).

It may be recalled that petitioner was a parolee from April, 1940, to May, 1941, and it is highly improbable that he or his friends would wish to have it made known to either the Iowa Parole Board or the Alcohol Tax Unit that he had substantial income or assets from the illegal liquor business during that period. And it is common knowledge that persons engaged in the transportation of liquor in dry states acquire automobiles with as little cash, and as large a mortgage as possible, in order to avoid loss in the event the vehicles are confiscated.

In this case the petitioner has reported all of the income from his illegal enterprise for the prosecution years.

In this respect it is distinguishable from those cases where the taxpayer reported no income from his concealed, illegal operations and prosecution by use of net worth method was apparently justified. Cf. *United States* v. *Johnson*, 319 U. S. 503, 87 L. Ed. 1546, 63 S. Ct. 1233. Nor is the conviction, unsupported by direct evidence of specific unreported income, justified as an expedient instrument of effecting social justice. Cf. *Capone* v. *United States*, 51 F. 2d 609, 76 A. L. R. 1534 (1931, C. A. 7th Ill.) and *Guzik* v. *United States*, 54 F. 2d 618 (1931, C. A. 7th Ill.). The opinion of the Appellate Court emphasizes the trap which the net worth method sets for the taxpayer:

> "The government's computations established the net worth as of December 31, 1946, of $123,318.01, and a net worth at the end of 1950 of $233,803.58, an increase of $110,485.57." (P. 4) * * * "His first federal income tax return was filed in 1943. From 1943 through 1946 he reported a net income of approximately $57,000.00." (P. 5).

In view of the fact that the government computed his net worth at the beginning of 1943 as $15,000.00 (Ex. 91, R. 267), that Court, and the jury in the trial court, could have reached either of two conclusions, *i. e.*, either the testimony of petitioner's wife was correct in respect to the cash on hand of $115,000.00 in 1943, or else he failed to report sizable amounts of income during the 1943-1946 period. It is interesting to note that the government credited him with no cash on hand until December 31, 1945, when it arbitrarily entered the sum of $10,100.00 which it thereafter carried unchanged for each year through the year 1950 (Ex. 91-92, R. 267-269). The danger in presenting those computations to a jury is obvious. If it believed that the taxpayer wilfully evaded the payment of income taxes for the years 1943-1946, prior to the prosecution period, it

would probably feel justified in returning a verdict of guilty as to the prosecution years although the government could not prove violations for those years beyond a reasonable doubt. The danger is dramatically illustrated by reference to the closing argument of the U. S. Attorney wherein he stated to the jury as follows:

> "During the period from 1943 through 1950 Mr. Mighell spent $188,000.00 more than what he reported on his income tax. Now, somewhere along the line Uncle Sam was getting cheated. * * * Sure, he cheated. There is no way out of it and they haven't shown us any evidence that he didn't (R. 213-214). * * * When you get through, you will know and you will reach a decision that Harvey Mighell had been cheating Uncle Sam pretty seriously (R. 214). * * * If they could prove it fine; but they can't prove it let's don't let them get away with that. You know if there was anything to it they would certainly have some corroboration but they have none." (R. 212-213).

Although the trial court instructed the jury as to the limits of the prosecution period, and warned the jury that any violations proven for the preprosecution years could only be used to show a probable wilful intent to evade the payment of taxes if the jury found unreported income in the later period, nevertheless it is highly improbable that the jury effectively separated the two periods and maintained an unbiased attitude toward petitioner, especially in view of the illegal nature of his principal business.

The facts and arguments presented herein have been addressed primarily to the year 1947 inasmuch as the accuracy of the opening net worth for that year necessarily affects each of the subsequent years. Especially is this true where the government carries forward from year to year the same erroneous and arbitrary cash on hand bal-

ance. Petitioner is aware that if the conviction for 1947 is sustainable, he would not be aided by a reversal of one or more of the convictions and concurrent sentences imposed for subsequent years. The specific years will be discussed only briefly. The indictment charges that petitioner had unreported taxable income in 1947 of $15,203.75. This amount is readily accounted for either by inventory of merchandise or unreported cash on hand. For 1948, the unreported income charged is $68,186.78. This sum is still within the amount of cash and inventory which the testimony discloses was in petitioner's possession and not computed by the government in his net assets. For 1949, the unreported income charged is $4,520.86. At the time of trial the government attempted to show unreported income of $12,486.88 rather than the amount charged in the indictment. By stipulation the unreported income for 1949 was reduced by $4,327.15 by eliminating $1,400.00 alleged gifts to petitioner's brother-in-law (R. 202) and excessive charge for living expenses of $2,927.15 (R. 161). The amount does not allow depreciation on automobiles which the government contends is non-deductible because used in an illegal business, and other items, non-fraudulent in nature, which would more than offset the sum charged without requiring greater cash on hand than the amount computed by the government. For the year 1950, the unreported income is charged to have been $33,949.34. In that year, as shown previously the petitioner recovered some $50,000.00 of buried cash which the government refuses to recognize. The cashier of the Home State Bank of Russell, Kansas, testified as to $8,800.00 worth of this soiled and depreciated money (R. 55). In addition, the record shows that petitioner's wife made a deposit of $26,000.00 of this hoard in the First National Bank of Omaha (R. 191). The existence of this $50,000.00 hoard does not, of course, explain petitioner's increase in net worth dur-

ing the earlier years. However, it was referred to earlier in connection with the entire prosecution period as affording substantial evidence as to the possession and ownership by the petitioner of large sums of cash in the earlier period. It is obvious that one who could withdraw $50,000.00 at one time and $25,000.00 at another time from operating capital in the pre-prosecution period must have maintained large cash reserves at all times.

Unlike the taxpayer in *United States* v. *Calderon, supra,* petitioner's cash hoard was sufficiently large to account for the increases in net worth for all of the prosecution period. In that case the court stated:

> "Second, there is evidence in this case which tends to negate the possibility that the alleged $17,000.00 hoard could have absorbed the deficiency for *any* of the prosecution years. This money supposedly went toward the purchase of equipment in 1946 and early 1947. Almost $16,000.00 in equipment was purchased in 1946; this accounts for nearly all of the cash hoard and still leaves a deficiency in 1946 of over $5,000.00 in unreported income. The funds which remain are insufficient to absorb the income deficiencies of any subsequent prosecution years." 348 U. S. 168.

In this case, the testimony places petitioner's cash on hand at $115,000.00 in 1943. This amount would be sufficient to account for all of the unreported income for 1947, 1948, 1949 and part of 1950, assuming *arguendo* that the government's remaining computations are correct. Other testimony, establishing that a business the size of petitioner's operation would require over $50,000.00 in cash, and that some $25,000.00 of buried currency was recovered in 1947, establishes that such sums would account for all of the unreported income charged for 1947 and most of 1948. And the recovery of $50,000.00 in buried

currency in 1950 accounts for all of the unreported income charged for that year. The failure of the government to disprove, or to attempt to prove or disprove the existence of petitioner's cash on hand required that the trial court sustain petitioner's motion for acquittal at the conclusion of all of the evidence.

An indispensable condition in prosecutions under the net worth theory is that the government establish with reasonable certainty an opening net worth from which increases in the taxpayer's assets may be computed. *Friedberg* v. *United States, supra; Holland* v. *United States, supra.* That condition is not present in the instant case. The fact that a taxpayer has made expenditures, investments, and savings in excess of his reported income over a period of years does not in the absence of a reasonably accurate starting point establish an evasion of income taxes. *Smith* v. *United States, supra; United States* v. *Calderon, supra.* When the government relies upon circumstantial evidence to establish the approximations necessary for a net worth prosecution, it must track down relevant leads furnished by the taxpayer and negate the reasonable explanations inconsistent with his guilt. *Holland* v. *United States.*

Where the evidence establishing a reasonably accurate net worth is insufficient to make out a *prima facia* case against the taxpayer on the net worth expenditures basis, the case should not be submitted to a jury. *Bryan* v. *United States,* (1949, C. A. 5th) 175 F. 2d 223, affd. 338 U. S. 552, 94 L. Ed. 335, 70 S. Ct. 317, reh. den. 338 U. S. 957, 94 L. Ed. 590, 70 S. Ct. 491; *United States* v. *Fenwick,* (1941, C. A. 7th) 177 F. 2d 488.

CONCLUSION.

WHEREFORE, your petitioner prays this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit for the purpose of reviewing the judgment of that court and of the District Court, and that this Court reverse such judgment in order that the injustice done to your petitioner may be undone.

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APPENDIX

APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

HARVEY N. MIGHELL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Number 5185.

Filed United States Court of Appeals, Tenth Circuit, May 17, 1956, Robert B. Cartwright.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

Carl V. Rice (Ernest J. Rice and Claude L. Rice were with him on the brief) for Appellant;

Royce D. Sickler, Assistant United States Attorney (William C. Farmer, United States Attorney, was with him on the brief) for Appellee.

Before BRATTON, Chief Judge, HUXMAN and MURRAH, United States Circuit Judges.

HUXMAN, Circuit Judge.

This is an appeal from a conviction in the United States District Court of Kansas for criminal evasion of federal income taxes. Defendant, Harvey N. Mighell, was found guilty under 26 U. S. C. A. § 145(b) on four counts for wilful failure to report substantial amounts of his income in 1947, 1948, 1949 and 1950. He was fined $3,000 and sentenced to imprisonment for a period of two years on count one, and to imprisonment for two years on each of the other three counts, such sentences to run concurrently with each other and with the sentence imposed on count one.

The proof for the prosecution was based upon the net worth method, sanctioned with limitations by the Supreme Court in *Holland* v. *United States*, 348 U. S. 121 (1954), and three companion cases.[1] It is admitted that defendant was actively engaged in the illegal business of buying and selling liquor in Kansas prior to the prosecution period and during 1947. There is dispute over whether such business continued in 1948 and later years. He also had income during the prosecution period from farming, oil, hotel and cafe partnerships, gambling, and some nonrecurring sources. A substantial amount of evidence was presented concerning these various dealings. The appeal raises only two principal questions: (1) Did the Government satisfy its burden of proof to establish a substantially accurate net worth statement as of the beginning of the prosecution period, January 1, 1947; and (2) did the government diligently pursue the leads which would tend to support defendant's innocence?

There is dispute over the inclusion or exclusion of several items in calculating the net worth of defendant at the various crucial dates. The principal controversy, how-

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[1] *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.

ever, is over alleged cash and liquor inventory which defendant claims he had on hand at the beginning of the prosecution period. The Government, in its presentation, gave defendant credit for no liquor inventory and only $10,100 cash on hand as of December 31, 1946. Defendant claims he had approximately $115,000 in cash and liquor inventory as of that date. If defendant's contention is true the excess expenditures during the 1947 to 1950 period relied upon by the Government are very largely explained since it is agreed that at the end of 1950 defendant had only about $10,000 cash and no liquor on hand. The burden of persuasion, of course, is upon the Government, and if we find there was no evidence reasonably tending to support the jury's verdict the judgment of conviction must be reversed.

The Government's computations established the net worth as of December 31, 1946, of $123,318.01, and a net worth at the end of 1950 of $233,803.58, an increase of $110,485.57. The Government's evidence tending to support its calculations of appellant's net worth status was as follows: From 1921 to 1928 defendant was a mechanic making an average of $110 per month. Between 1929 and 1936 he farmed, was a mechanic and tinsmith and bootlegged some whiskey. From 1938 to April, 1940 he was serving a sentence in the Iowa State Penitentiary. Sometime during 1940 he was divorced from his first wife, in which proceeding there was no property settlement and no alimony award. According to his parole reports, between April, 1940 and at least May, 1941 he worked on his father's farm for $20 per month. During this time he reportedly received small amounts of money—from $2 to $10—from time to time from his mother. A 1941 investigation by the Alcohol Tax Unit of the Internal Revenue Department in Iowa found no assets of the defend-

ant. On November 14, 1941 he placed a $414.30 chattel mortgage on a 1941 Ford automobile, which he had or purchased.

During March and April, 1942 he worked for the Cessna Aircraft Company for 60 cents an hour. During the last six months of 1942 he was serving a Missouri sentence for transportation of liquor and had no earnings. In 1944 when he purchased the home in Russell, Kansas, he mortgaged it for $5,000. It was shown that he had no substantial inheritances or gifts. His first federal income tax return was filed in 1943. From 1943 through 1946 he reported a net income of approximately $57,000.

Appellant was married to his second and present wife in December, 1942. An investigation showed that she had acquired no substantial amount by way of gifts, loans, or inheritances. Her first federal income tax return was filed in 1942 showing income of less than $2,400. She testified that at the beginning of 1943 her assets amounted to about $1,000. This in substance was the Government's evidence from which it prepared appellant's net worth statement as of December, 1946.

Appellant offered substantially the following evidence. His son and his wife testified that $50,000 cash was buried in 1943. A garage owner stated that prior to 1945 appellant had left various amounts of cash of as much as $38,000 with him from time to time for overnight safekeeping. Other persons testified that he had large sums of money on different occasions in the pre-prosecution period. Edward Flaherty, a former partner, testified that for an operation as large as that of appellant's it would take a bank roll of as much as $50,000.

There was testimony concerning nearly $35,000 of mutilated or deteriorated money turned over in 1950 to a

bank in Russdl, Kansas, and one in Omaha, Nebraska. Appellant's wfe testified that she told an agent for the Government tiat she put $26,000 of such money in the First National Bank of Omaha, Nebraska. A check by a government agent with that bank showed a deposit in that amount tut there was no record that it was deteriorated money.

The most that can be said from this evidence, is that it presented a conflict for the jury's determination. No one other than appellant's wife testified that appellant had on hand $50,000 or any substantial part thereof as operating capital at the beginning of 1947. Neither was there any direct evidence that there was on hand at any time a substantial liquor inventory. We are in effect asked to presume that there must have been on hand a large inventory in order to carry on illicit liquor operations of such magnitude, but such a presumption disregards the very nature of appellant's illegal business. His business was carried on in dry territory close to the border of a state where the purchase of liquor was lawful. It is not unreasonable to presume, especially in the absence of any evidence to the contrary, that rather than subject himself to search and seizure appellant sent the trucks which he owned across the line by stealth, loaded them with liquor, and transported it to its destination, rather than keeping on hand in dry territory, where it was subject to confiscation, large quantities from which to make deliveries. In any event in the absence of any clear and convincing evidence that appellant had on hand a substantial liquor inventory, the question at best was for the jury.

Neither was the evidence conclusive that there was a buried hoard of $50,000 or, if there was, when it was buried. But even if we assume that such sum was buried prior to 1947, it still leaves unaccounted for a very substantial

amount of unreported income, if the jury believed the Government's evidence, as it apparently did.

In the second assignment of error it is urged that the Government failed to follow all reasonable leads in an attempt to establish the true facts in its net worth case, as required by *Holland* v. *United States, supra*, and kindred cases. Two instances of this failure to track down leads are urged in connection with the buried money contention. When Internal Revenue investigators were questioning appellant on December 9, 1952, he mentioned the buried money and asserted that his son Roger had seen him count it during the period prior to 1947. It is urged that the Government erred in not interrogating the son. At this time appellant's son was in the army. His address was furnished and it is urged that the Government erred in not having someone near the boy's army camp interrogate him on the claim of buried money before the father had time to prepare him for the questioning. Appellant had stated to the investigator that "I don't think he will answer any questions for you." In view of that as well as the further fact that if the son had corroborated his father's statement, it would not have conclusively established the existence of such a buried hoard at that time, it is our view that failure to interrogate the son did not constitute a violation of the admonition of the Supreme Court.

With respect to the cashing of the mutilated or deteriorated money in Russell, Kansas, and Omaha, Nebraska, it is urged that the Government should have done more checking than it did. Appellant's wife told the agents that she put $26,000 of this money in the First National Bank of Omaha, Nebraska. The agent did check with the bank and the records there showed such a deposit but no record that it was deteriorated money and the agent did not investigate further than writing to the Currency Redemp-

tion Department. No hint was given by appellant's wife that the deteriorated money had first been converted to good money at the Omaha National Bank and the good bills then taken and placed in deposit in another bank. In the absence of more information than the Government had, we do not think it was required to check every bank in Omaha to see if deteriorated money had been redeemed there.

The instant net worth case involves tracing transactions over a number of years. Appellant's total net worth at the end of the prosecution period was nearly a quarter of a million dollars. Taking this into account and the further fact that books on a large part of the operation were nonexistent, it seems inconceivable that all ends would be tied down and no remote possibilities overlooked. It is our conclusion from a careful examination of the entire record that the Government made a reasonable effort to track down all sources of possible information in establishing appellant's net worth and that there was no violation of the admonition laid down by the Supreme Court in the Holland case.

AFFIRMED.